

# Exhibit 8

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

WAYNE BERRY, a Hawaii )  
citizen, )  
Plaintiff, )  
vs. ) Civil No. CV03-00385  
HAWAIIAN EXPRESS SERVICE, ) SOM-LEK  
INC., a California ) (Copyright)  
corporation, et al., )  
Defendants. )  
\_\_\_\_\_)

DEPOSITION OF BRIAN CHRISTENSEN

Taken on behalf of Plaintiff Wayne Berry at 1132  
Bishop Street, Suite 306, Honolulu, Hawaii, 96813,  
commencing at 9:05 a.m., on Monday, December 6,  
2004, pursuant to Notice.

REPORTED BY: JANIS K. FLOATE, RPR, CSR 254  
Notary Public, State of Hawaii

1 APPEARANCES:

2 For Plaintiff Wayne Berry:

3 TIMOTHY J. HOGAN, ESQ.  
4 Lynch Ichida Thompson Kim & Hirota  
5 1132 Bishop Street, Suite 1405  
Honolulu, Hawaii 96813

6 For Defendants Hawaiian Express Service, Inc.;  
7 H.E.S. Transportation Services, Inc.; California  
Pacific Consolidators, Inc.; Jeffrey P. Graham and  
Peter Schaul:

8 (telephonic appearance)  
9 EMILY REBER PORTER, ESQ.  
10 Goodsill Anderson Quinn & Stifel  
11 1800 Alii Place  
1099 Alakea Street  
Honolulu, Hawaii 96813

12 For Defendants Fleming Companies, Inc.; C&S  
13 Wholesale Grocers, Inc.; C&S Logistics of Hawaii,  
LLC; C&S Acquisitions, LLC; ES3, LLC; and Richard  
Cohen:

14 LEX R. SMITH, ESQ.  
15 Kobayashi Sugita & Goda  
2600 First Hawaiian Center  
16 999 Bishop Street  
Honolulu, Hawaii 96813

17 For Defendant Hawaii Transfer Company, Limited:

18 JULIA MORGAN, ESQ.  
19 Fukunaga Matayoshi Hershey & Ching, LLC  
1200 Davies Pacific Center  
20 841 Bishop Street  
Honolulu, Hawaii 96813

21 For Defendant Foodland Super Market, Limited:

22 LEROY E. COLOMBE, ESQ.  
23 Chun Kerr Dodd Beaman & Wong, LLC  
900 Topa Financial Center  
24 745 Fort Street  
Honolulu, Hawaii 96813  
25

1 If we can go off the record for one  
2 second.

3 (Discussion off the record.)

4 (Exhibit 27 marked for identification.)

5 BY MR. HOGAN:

6 Q. Mr. Christensen, you've been handed what's  
7 been marked for identification as Exhibit 27. It is  
8 a three-page document starting with Exhibit M on the  
9 front and then two pages of what looks like a letter  
10 dated August 23rd. Do you see that?

11 A. Yes.

12 Q. Have you ever seen this before?

13 A. No.

14 Q. Do you have any knowledge of any of the --  
15 has anyone at C&S -- I'm not talking about lawyers,  
16 but management at C&S -- ever identified to you that  
17 they had an indemnity agreement with Fleming  
18 regarding this litigation?

19 A. No.

20 Q. And you've never seen this letter before?

21 A. Correct.

22 MR. HOSODA: Asked and answered.

23 BY MR. HOGAN:

24 Q. What is your job presently at C&S?

25 A. I'm the division president.

1 Q. How long have you held that position?

2 A. Since March of 2003. ←

3 Q. Now, March 2003 was the period during the  
4 original jury trial. Do you recall that?

5 A. That's my understanding, yes.

6 Q. Is it fair to say that you were the  
7 replacement for Ralph Stussi?

8 A. Yes.

9 Q. Do you have any understanding of the  
10 reason that Ralph Stussi ceased to be the division  
11 head at Fleming?

12 A. Yes.

13 Q. What is that understanding?

14 A. That he had an opportunity at another  
15 division in Texas. So he took that.

16 Q. Do you have any understanding that Mr.  
17 Stussi was disciplined in any way for his conduct of  
18 the litigation?

19 A. No.

20 Q. Presently, sir, do you supervise any  
21 employees?

22 A. Yes.

23 Q. Have you supervised employees since March  
24 of 2003?

25 A. Yes.

1 Q. Who do you supervise?

2 A. I'm responsible for the division as a  
3 whole.

4 Q. So that would be all --

5 A. All.

6 Q. -- the employees?

7 A. Correct.

8 Q. How many employees are at the division?

9 A. Approximately 210.

10 Q. Now, you're aware that there is a lawsuit  
11 regarding the use of certain software?

12 A. Yes.

13 Q. So we have the terms clear, prior to the  
14 jury trial in March, what is your understanding of  
15 what software Fleming was using in its logistics  
16 department in Hawaii to operate its rate program?

17 MR. SMITH: Objection. Overbroad, vague  
18 and ambiguous.

19 MR. HOSODA: I object to the form as well.

20 BY MR. HOGAN:

21 Q. Have you ever met Wayne Berry before?

22 A. Yes.

23 Q. Are you aware that Mr. Berry is a computer  
24 programmer?

25 A. Yes.



1 Q. Why do you believe that to be so?

2 A. I met Mr. Berry in the late '90s when he  
3 was with API and first came to work with Fleming.

4 Q. When you say API, you mean Atlantic  
5 Pacific International, Inc.?

6 A. Right.

7 Q. We can use API.

8 A. Okay.

9 Q. What did API do for Fleming, to the best  
10 of your knowledge?

11 A. They helped develop a system to coordinate  
12 and track freight.

13 Q. As part of that system, computers are  
14 used; is that a fair statement?

15 A. Yes.

16 Q. Are you aware that one of the programs  
17 that is used in that computer system is an Access  
18 database?

19 A. I've heard that.

20 Q. You've heard that?

21 A. Yes.

22 Q. Where have you heard that?

23 A. It could have been through Ralph Stussi or  
24 Mark Dillon.

25 Q. But is it fair to say that there is a term

1 that you feel comfortable with to identify that  
2 Access database that was being used in March of  
3 2003?

4 A. I think that Access database is fine.

5 Q. If we use Access database and we talk  
6 about it in terms of the timing and the year, would  
7 that be sufficient so we understand it?

8 A. Yes.

9 Q. So March 1st, 2003, is it your  
10 understanding that there was an Access database  
11 operating at Fleming logistics?

12 MR. SMITH: Calls for speculation.

13 BY MR. HOGAN:

14 Q. You can answer the question, if you can.

15 A. That's my understanding.

16 Q. What do you base that understanding on?

17 A. From what little I know about the database  
18 itself, I've heard that term used.

19 Q. Had you heard it on or about March 1st,  
20 2003?

21 A. Yes.

22 Q. Were you supervising employees at that  
23 time at Fleming that were working in the freight or  
24 the Fleming logistics department?

25 A. No.



1 Q. Who was supervising them?

2 A. Ralph Stussi.

3 Q. When did Ralph Stussi stop working for  
4 Fleming Hawaii?

5 A. Right about that time actually.

6 Q. So do you recall the precise date?

7 A. No, I don't.

8 Q. Was it prior to April 1st, 2003?

9 A. Yes.

10 Q. So sometime after April 1st, 2003 or after  
11 March 1st, 2003 but before April 1st, 2003, you  
12 became the supervisor of the people at the Fleming  
13 freight logistics department?

14 A. Correct.

15 Q. But you don't know the exact date?

16 A. I became the president on the 23rd, I  
17 believe, of March.

18 Q. At that time it is your understanding that  
19 you would be their supervisor?

20 A. Correct.

21 Q. Were you aware at that time, sir, that  
22 there had been a jury verdict finding that Fleming  
23 had infringed Mr. Berry's software?

24 A. Yes.

25 Q. What, if anything, did you do to ensure

1 that Fleming no longer infringed Mr. Berry's  
2 software?

3 A. My understanding was that we did have a  
4 license to use the original software and that was  
5 the intent and it was to go back to that original  
6 form of the database.

7 Q. Now, did you make the decision to do that?

8 A. No.

9 Q. Do you know who did?

10 A. No.

11 Q. Do you know how it was communicated to you  
12 that there had been a decision to do that?

13 A. Specifically, no, I don't know who told me  
14 that, but yes.

15 Q. You believe that was before April 1st?

16 A. The verdict?

17 Q. No. I'm sorry. That the decision to go  
18 back to what was -- I believe you used the term  
19 original version. I think that's what you said.  
20 I'm not trying to misstate it. But if you did say  
21 the original version, that decision was prior to  
22 April 1st?

23 A. I'm not sure on the date.

24 Q. Were you aware prior to the filing of the  
25 Fleming bankruptcy on April 1st, 2003, that Fleming

1 was going to file bankruptcy?

2 A. No.

3 Q. Is it fair to say that you found out after  
4 they filed?

5 A. Yes.

6 Q. Have you ever offered any of the employees  
7 that are presently working for you the option of not  
8 using any of the software that's subject to this  
9 litigation?

10 MR. SMITH: Vague and ambiguous.

11 MR. HOSODA: I join.

12 BY MR. HOGAN:

13 Q. After the jury verdict Fleming did  
14 something to the software that was operating in the  
15 freight logistics department; is that correct?

16 A. Yes.

17 MR. SMITH: Vague and ambiguous, over  
18 broad.

19 MR. HOSODA: I join.

20 BY MR. HOGAN:

21 Q. Did Fleming, to the best of your  
22 knowledge, revert to the original license version?

23 A. Yes.

24 Q. Why do you say that?

25 A. Because Mark Dillon, who was my

1 programmer, took the oldest copy that he had and  
2 took out the changes that he had made to get it to  
3 that original state.

4 Q. What makes you say that that happened?  
5 Why do you believe that?

6 A. Because after that, we had a lot of  
7 problems with the database and it was based on  
8 taking out the changes that we made to make it work.

9 Q. Did it ever occur to you to contact Wayne  
10 Berry to get an actual original copy of the  
11 software?

12 A. I wasn't involved in the trial itself and  
13 the subsequent decision to go back to the software.  
14 So I don't know if I can answer that.

15 MR. HOGAN: Let's mark this as the next in  
16 order.

17 (Exhibit 28 marked for identification.)

18 BY MR. HOGAN:

19 Q. Mr. Christensen, you have been handed a  
20 document marked for identification as Exhibit 28.  
21 Have you ever seen that before?

22 A. Yes.

23 Q. Is that one of the e-mails that you  
24 reviewed prior to your deposition?

25 A. Yes.



## C E R T I F I C A T E

STATE OF HAWAII )  
 ) SS.  
 CITY AND COUNTY OF HONOLULU )

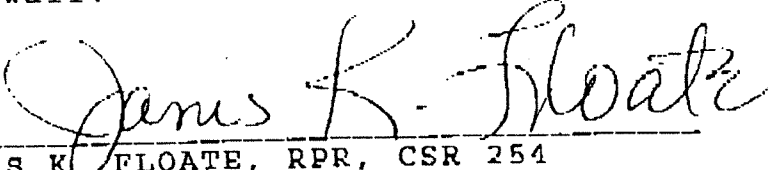
I, JANIS K. FLOATE, Notary Public, State  
 of Hawaii, do hereby certify:

That on December 6, 2004, appeared before  
 me Brian Christensen, the witness whose deposition  
 is contained herein; that prior to being examined, the  
 witness was by me duly sworn;

That the deposition was taken down by me  
 in machine shorthand and was thereafter reduced to  
 typewriting under my supervision; that the foregoing  
 represents to the best of my ability, a true and  
 correct transcript of the proceedings had in the  
 foregoing matter.

I further certify that I am not an  
 attorney for any of the parties hereto, nor in any  
 way concerned with the cause.

DATED this 15 day of Dec, 2004,  
 in Honolulu, Hawaii.

  
 JANIS K. FLOATE, RPR, CSR 254  
 Notary Public, State of Hawaii  
 My Commission Exp: December 12, 2005